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No. 91-306

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT L. STEELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person who provides false documents in response to an inquiry from an Internal Revenue Service agent investigating another individual may be prosecuted under 18 U.S.C. 1001 for using a false writing.

2. Whether the district court erred in instructing the jury that statements or omissions as to gross income on petitioner's tax returns were material.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-27a) is reported at 933 F.2d 1313. The opinion of the court of appeals panel (Pet. App. 28a-49a) is reported at 896 F.2d 998.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1991. Pet. App. 1a. The petition for a writ of certiorari was filed on August 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiring to defraud the Internal

Revenue Service, in violation of 18 U.S.C. 371; filing false individual and partnership income tax returns, in violation of 26 U.S.C. 7206(1); and submitting false documents to the Internal Revenue Service, in violation of 18 U.S.C. 1001. The district court sentenced petitioner to a three-year term of imprisonment on each count, to be served concurrently. The court of appeals sitting en banc affirmed.

1. In May 1981, petitioner, a certified public accountant, formed a partnership with his wife, his accounting partner Danny Pelphrey, and Pelphrey's wife. The purpose of the partnership was to purchase, subdivide, and sell tracts of real property. In June 1981, petitioner met with Thomas Duerr to discuss the sale of two parcels of land owned by the partnership. In order to accommodate Duerr's desire to conceal from the IRS the illegal source of his income (selling controlled substances), petitioner sold the parcels for $80,000 but created sales documents that reflected a purchase price of $40,000. Duerr made payments according to the terms of the sales contracts but also paid petitioner $40,000 in cash, which petitioner divided among himself and his partners. Petitioner filed income tax returns for himself and the partnership that did not report any portion of the $40,000 cash payment. Pet. App. 2a-3a, 29a-30a.

In August 1985, a grand jury indicted Duerr on various drug charges, and the IRS began investigating him for possible tax evasion charges. In November 1985, IRS Special Agent Hall contacted petitioner (who was not then a suspect) and explained the nature of the investigation of Duerr. Hall asked for information about the 1981 land sale to Duerr. Petitioner told the agent that he would send him copies of all documents relating to the land sale. Pet. App. 3a-4a, 30a-31a.

Immediately thereafter, petitioner arranged to meet with Duerr. After Duerr assured petitioner that he would tell the authorities that the transaction actually occurred in the manner described in the false documents in petitioner's possession, petitioner told Duerr that he would send the documents to Hall. Subsequently, petitioner sent the documents, accompanied by a cover letter, which stated: "Dear Mr. Hall: Enclosed you will find copies of all the documents which we have in our possession regarding Thomas R. Duerr." One month later, Duerr agreed to plead guilty and to cooperate with the government. Thereafter, he disclosed the fraudulent nature of the land transactions with petitioner. Pet. App. 4a, 19a n.2, 31a.

2. At trial, petitioner contended that the misstatements of his income on the tax returns for himself and the partnership were not material, because they did not alter his actual tax liability for 1981. The district court rejected that contention and instructed the jury that the misstatements were material as a matter of law. Pet. App. 43a.

3. On appeal, petitioner contended, *inter alia*, (1) that his use of the documents was not punishable under Section 1001 because of the so-called "exculpatory no" exception to Section 1001, and (2) that it was error to instruct the jury that statements or omissions as to gross income on a tax return are material as a matter of law. Pet. App. 32a, 43a.

a. A divided panel of the court of appeals reversed petitioner's false statement conviction on the ground that petitioner's actions fell within the "exculpatory no" exception to Section 1001. Pet. App. 32a-41a.[1]

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[1] Judge Ryan dissented, arguing that the "exculpatory no" doctrine constituted an impermissible judicial exception to the plain language of Section 1001. Pet. App. 44a-49a.

Relying on *Kungys* v. *United States*, 485 U.S. 759 (1988), the panel rejected petitioner's contention that the trial judge erred in instructing the jury on materiality as a matter of law. Pet. App. 41a-43a.

b. On rehearing en banc, the court of appeals reversed the panel's decision with respect to the "exculpatory no" exception and affirmed petitioner's conviction. Pet. App. 1a-15a. The court first considered whether petitioner's conduct satisfied the elements of the statute as written and concluded that the defendant had "used" a document in violation of Section 1001 by "knowingly and willfully submitting a false and material document to an agency on a matter that is within the jurisdiction of such agency." Pet. App. 8a n.5. The court explained that a "requirement that such conduct amount to a representation * * * regarding a document's veracity [was] [s]ubsumed in the * * * mens rea and materiality elements [of Section 1001]." *Ibid.*[2]

The court then addressed the "exculpatory no" exception, first articulated at the appellate level by the Fifth Circuit in *Paternostro* v. *United States*, 311 F.2d 298 (1962).[3] The court noted that petitioner's

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[2] Judge Nelson concurred on this point, explaining that in his view petitioner's letter constituted an implied representation that the documents were accurate. The breach of that implied representation, in his view, was sufficient to make petitioner liable under the statute. Pet. App. 15a. Senior Judge Brown, joined by Chief Judge Merritt and Judge Martin, dissented on the same point; in their view, petitioner's conduct did not constitute the "use" of a false document. *Id.* at 19a-22a. Chief Judge Merritt filed a separate dissenting opinion, arguing that petitioner never represented that the documents were accurate. *Id.* at 26a-27a.

[3] As the court of appeals explained, the central concept of the "exculpatory no" exception is the conclusion that "the

actions did not "come within *Paternostro*'s exception [for] a simple 'no' answer," and concluded that it had no occasion to address the applicability of the statute to that situation. Pet. App. 10a. The court of appeals then rejected petitioner's argument that it should adopt the broader five-part test for the exception that had been discussed in opinions from the Fourth and Ninth Circuits, concluding that the scope of the statute was limited sufficiently by the acknowledged rule that it covered only "material" statements. *Id.* at 11a-14a.[4]

ARGUMENT

At the outset, we note that the claims that petitioner raises have little practical effect on him, because he does not challenge his conviction under Section 371, and because his concurrent sentence on that count is identical to his sentences on the counts he does challenge. In any event, we do not believe that the claims he does raise are appropriate for plenary review.

1. Petitioner's principal contention (Pet. 7-12) is that this Court should use this case to determine the propriety and general features of the "exculpa-

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'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of defendant does not come within the scope of [Section 1001]." Pet. App. 10a (quoting *Paternostro*, 311 F.2d at 309).

[4] Senior Judge Wellford concurred, arguing that, whatever the merits of the "exculpatory no" exception as a general matter, it had no applicability here because petitioner was not under investigation at the time he responded to Agent Hall's inquiry. Pet. App. 15a-17a. Senior Judge Brown, joined by Chief Judge Merritt and Judge Martin, dissented on the "exculpatory no" issue, contending that the "exculpatory no" exception barred petitioner's conviction. Pet. App. 22a-26a. Judge Martin filed a separate dissenting opinion on the "exculpatory no" issue. *Id.* at 27a.

tory no" exception to Section 1001.[5] Although we agree with petitioner that the lower courts have not spoken with one voice in this area, we do not believe this is an appropriate case to resolve the questions the petition discusses, because the unusual facts of this case do not present the issue in a manner that would permit the Court to address the general question of the proper scope of the "exculpatory no" exception as it may apply to false statements prosecuted under Section 1001.

Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

This Court has rejected "narrow, technical" constructions of this language, recognizing the "sweeping, every-day language" of the statute. *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); see *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955) (explaining, in a case under Section 1001, that "criminal

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[5] Petitioner does not appear to challenge the portion of the court of appeals' opinion determining that his conduct amounted to "use" of the documents for purposes of Section 1001 (Pet. App. 8a-10a), an issue debated in the separate concurring opinion of Judge Nelson (Pet. App. 15a) and the dissenting opinions of Senior Judge Brown (Pet. App. 19a-22a) and Chief Judge Merritt (Pet. App. 26a-27a).

statutes are to be construed strictly," but "this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

Notwithstanding this Court's broad interpretation of the language of Section 1001, several courts of appeals, following the lead of the Fifth Circuit in *Paternostro* v. *United States*, *supra*, have recognized an "exculpatory no" exception to Section 1001, resting on the general notion that simple "negative, oral responses to * * * questioning * * * [are] not 'statements' within the meaning of [Section] 1001." Pet. App. 11a n.6 (quoting *United States* v. *Chevoor*, 526 F.2d 178, 184 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976)). See, *e.g.*, *United States* v. *Cogdell*, 844 F.2d 179, 182-185 (4th Cir. 1988); *United States* v. *Bedore*, 455 F.2d 1109, 1110-1111 (9th Cir. 1972); *United States* v. *Tabor*, 788 F.2d 714, 717-719 (11th Cir. 1986); see also *Chevoor*, 526 F.2d at 182-184 (1st Cir.) (suggesting in dictum that the doctrine would apply in an appropriate case). Several other courts of appeals have noted the existence of the doctrine, with varying degrees of approval, but have not explicitly adopted or rejected it. See, *e.g.*, *United States* v. *Cervone*, 907 F.2d 332, 342-343 (2d Cir. 1990), cert. denied, 111 S. Ct. 680 (1991); *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980); *United States* v. *Fitzgibbon*, 619 F.2d 874, 876-881 (10th Cir. 1980); *United States* v. *White*, 887 F.2d 267, 273-274 (D.C. Cir. 1989).

As petitioner points out, the courts of appeals do not all apply the same test in determining whether a statement falls within the doctrine. For example, the Second Circuit has stated that, if the exception exists, it does not apply to "any statement beyond a

simple 'no.' " *United States* v. *Capo*, 791 F.2d 1054, 1069 (2d Cir. 1986), rev'd on reh'g on other grounds, 817 F.2d 947 (1987); see *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980) (noting that the exception is "very limited" and applies only "to simple negative answers, without affirmative discursive falsehood" (citation omitted)). The Ninth Circuit in *United States* v. *Medina de Perez*, 799 F.2d 540, 543-546 (1986), adopted a more elaborate test, holding that the "exculpatory no" exception is unavailable unless (1) the statement is unrelated to a claim against the government; (2) the declarant is responding to a government inquiry; (3) the statement does not impair the basic functions of the agency; (4) the inquiry is investigative, rather than routine and administrative; and (5) a truthful answer would have been incriminating. See *United States* v. *Cogdell*, *supra* (adopting this test in the Fourth Circuit); *United States* v. *Taylor*, 907 F.2d 801, 803-807 (8th Cir. 1990) (adopting this test). Although most cases are likely to be decided the same way under either test, there are cases that have resulted in reversal of convictions under the Ninth Circuit test that probably would have been affirmed under the "simple no" test suggested by courts such as the Second and Seventh Circuits. See, *e.g.*, *Medina de Perez*, 799 F.2d at 541-542 (defendant falsely stated that she had borrowed a truck from a friend and driven it to Mexico to go shopping); *United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988) (defendant gave false name to Border Patrol officer); *United States* v. *Myers*, 878 F.2d 1142, 1143-1444 (9th Cir. 1989) (defendant falsely stated that he flew a plane into prohibited airspace because he lost his contact lenses while in flight).

Although the scope of the "exculpatory no" exception raises questions that may warrant review by this Court in an appropriate case, we do not believe this case is a suitable vehicle for examination of the area. Petitioner's prosecution rests on the delivery of false documents to the Internal Revenue Service, an action far from the simple, negative response at the core of the doctrine. Indeed, the prosecution in this case was based on a different clause of Section 1001 (the "uses any false writing or document" clause) than the one that has provoked disagreement over the existence and scope of the "exculpatory no" doctrine (the "makes any false * * * statements" clause). To our knowledge, no court of appeals ever has applied the "exculpatory no" exception to invalidate a conviction based on the use of false documents, rather than the making of false statements by the defendant. Cf. *United States* v. *Johnson*, 530 F.2d 52, 55 (5th Cir.) (affirming a conviction based on the submission of a false affidavit of a third party; holding that the "exculpatory no" exception did not apply because the defendant voluntarily supplied the affidavit to the government), cert. denied, 429 U.S. 833 (1976). Moreover, petitioner's actions before delivering the documents—consulting with Duerr to make sure that Duerr would corroborate petitioner's story—make it clear that petitioner's conduct consisted of much more than the simple refusal to supply information that some courts have found to be protected by the exception. Accordingly, the facts of this case do not provide the Court with an appropriate vehicle to resolve the general questions about the doctrine that currently divide the courts of appeals.

2. Petitioner also contends (Pet. 13-14) that the district court erred in instructing the jury as a mat-

ter of law that the omission of gross income on an income tax return is a material matter; he contends that the materiality of the false statement on the income tax return was an issue for the jury.

In *Kungys* v. *United States*, 485 U.S. 759 (1988), this Court considered the same question with respect to 8 U.S.C. 1451(a), which provides for denaturalization of citizens whose citizenship orders "were procured by concealment of a material fact." The Court first noted: "[W]e see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers." 485 U.S. at 772. It then adopted for use under Section 1451(a) the general practice with respect to Section 1001:

> [A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

485 U.S. at 772 (bracketed insertions by this Court).

Petitioner suggests no reason why this analysis should not apply with equal force to the materiality requirement in Section 7206. Indeed, each of the ten courts of appeals that has considered the question has reached the same result as the court below. See, *e.g.*, *United States* v. *Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States* v. *Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984); *United States* v. *Rogers*, 853 F.2d 249, 251 (4th Cir.), cert. denied, 488 U.S. 946 (1988); *United States* v. *Taylor*, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United*

States v. *Fawaz*, 881 F.2d 259, 261-262 (6th Cir. 1989); *United States* v. *Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States* v. *Holecek*, 739 F.2d 331, 337 (8th Cir. 1984), cert. denied, 469 U.S. 1218 (1985); *United States* v. *Flake*, 746 F.2d 535, 537-538 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Strand*, 617 F.2d 571, 573-574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States* v. *Gaines*, 690 F.2d 849, 858 (11th Cir. 1982) (dictum).[6] This issue does not merit further review.

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[6] In any event, petitioner's claim that the omission was not material is insupportable. The only reason given to justify petitioner's claim that the omission was immaterial is his claim that the omission did not affect his tax liability. But it is not necessary for an omission to have tax consequences in order for it to be material; all that is necessary is that it have the potential to affect the functions of the IRS. See, *e.g.*, *United States* v. *Taylor*, 574 F.2d 232, 236-237 (5th Cir.) (the fact that an omission had no tax consequences could not be offered to negate materiality), cert. denied, 439 U.S. 893 (1978); see also *United States* v. *Molinares*, 700 F.2d 647, 654 (11th Cir. 1983) (characterizing perjured testimony as material even if it is "not ultimately dispositive of the issue" before the court). It is obvious that the omission of $40,000 in gross income has a natural tendency to influence the IRS's functions in calculating and assessing the appropriate amount of tax for petitioner or others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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